

Wyoming Energy Authority – Notes on Authority Status

Why does WEA need to be set up as an Authority and not an agency?

The legislation establishing the WEA directs it to perform certain functions that the state cannot because of constitutional restrictions. By being sufficiently separated from the state, the WEA can engage in these functions and benefit the state while legislative oversight is maintained. Were the WEA a state agency or too closely associated with the state, it simply could not fulfill its mission or achieve its purposes. Like the WPA and the WIA before it, the WEA was therefore created as an “Authority;” a type of entity created and directed by the state, but that nonetheless maintains a separation sufficient to not be deemed the state for purposes of constitutional restrictions. This status allows the WEA to engage in programs and efforts that the state itself cannot.

What is an “Authority?”

An Authority is simply another form of state-created entity, but with distinct characteristics that sufficiently separate it from the state to enable it to engage in activities the state itself cannot. Nonetheless, Authorities, agencies, commissions, and other types of governmental entities are created by the legislature, which defines their purposes, powers, structure, and responsibilities, and also oversees the Authority’s budget. This legislative use of different forms of entities for different circumstances is not unusual - there currently exists, for example, the Wyoming Business Council, the Wyoming Community Development Authority, the Wyoming Game and Fish Commission; municipal and county housing authorities; and the Wyoming Retirement System. All are created by the state but serve different functions.

Specific to the WEA, its status is distinct from the state to enable it to participate in energy-related projects and activities which the state is prohibited from undertaking due to constitutional limitations on state actions. The best examples of this are found in the WEA’s bonding authority. In order to fund the development of projects and energy-related facilities, the WEA can issue its own bonds. As these are not state funds being used to support private development, this bonding is permissible. *See Wyoming Constitution, Article 16, Section 6(a)(i).* Further, the autonomy of the WEA means bonds it issues are not the responsibility of the state - they remain solely the obligation of the WEA. Finally, the WEA may issue bonds to finance “works of internal improvement” such as pipeline or electrical transmission line construction - projects the state itself is constitutionally prohibited from financing. *See Wyoming Constitution, Article 16, Section 6(b).*

A further benefit of the authority structure is that as an autonomous entity, the WEA is liable for its own actions and has the ability to sue and be sued in its own right, separate and distinct from the state.

What's the risk of using the Authority model?

For the specific purposes to which the WEA is committed, the Authority model is the logical and appropriate mechanism.

There could be anxiety of giving the required degree of autonomy to the WEA as some may be concerned that the state would not have sufficient control over its decisions and actions. The answer however, is that even though it is an Authority, the legislature carries the ultimate oversight of the WEA. Not only can the legislature change the statute governing the WEA, but the legislature maintains “the power of the purse” over its operations.

Perhaps the largest risk with the Authority model is that if not created and sustained as an entity completely distinct from the state, it risks being interpreted as an agency or some other arm of the state. Should this happen the fundamental benefits of an Authority would be lost. It is therefore essential that as much administrative, organizational, and legal distance as possible be established and maintained between the Authority and the state. These distinctions are comparatively easy to identify and address and can be provided if necessary.

What is the advantage of using an Authority model?

The history of the WPA and the WIA demonstrates that the Authority model can be extremely effective, efficient, and cost effective when successfully implemented. To successfully carry out its statutory mandates, the WEA must use the Authority model. It provides the required constitutional separation but does not deprive the legislature of oversight.

How Separate Does the WEA Need to Be?

The more attributes of a state agency that the WEA has, the more it risks being deemed an agency of the state. This would of course defeat the entire purpose of using an Authority structure and prevent the state from obtaining the benefit of implementing it.

Conversely, the more distinctions that can be established between the state and the Authority - administratively, structurally, and with personnel for example, the more apparent the distinction will appear.

Under the Authority model, all aspects of its operations must be examined and the maximum separation possible must be maintained. Amendments to the statutes of the WPA and the WIA over the last decade arguably brought both close to status as the state and hopefully those questions will be resolved by future amendments to the WEA statutes.

Distinctions between an “Authority” and an “Agency”

<u>Authority</u>	<u>Agency</u>
Not statutorily defined	Statutorily defined in various locations. For example, W. S. 9-2-1002(a)(i): “‘Agency’ means an office, department, board, commission or operating unit of the executive branch of state government;”
“...a body politic and corporate operating as an instrumentality of the state of Wyoming”	Arm of the Executive Branch
“...with authority to...sue and be sued.”	Likely protected by governmental immunity
Audited by WDA	Audited by WDA
Outside consultants and specialists permitted	Generally rely upon state employees
Represented by outside counsel	Represented by the Attorney General’s Office
Specific purposes and goals	Broad charge over a statutorily defined area
Governed by an independent, appointed Board	Appointed Agency Head
Governing Board of private, experienced citizens who are uncompensated	Appointed Agency Head
Executive Director employed by the Board	Appointed Agency Head
Funded by legislative appropriation	Funded by legislative appropriation
Can operate outside some constitutional limitations	Constitutionally and statutorily limited
Corporate governance model	Traditional state agency model
Responsible for its own debts, obligations and contracts	State responsibility
Ability to issue its own bonds, no recourse to the state	State liability